

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1716

Cir. Ct. No. 2016SC5377

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

LAKISHA K. WILBURN,

PLAINTIFF-APPELLANT,

V.

ROBERT NASH AND SARITA NASH,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County:
TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Lakisha K. Wilburn appeals two orders of the circuit court granting summary judgment in favor of Robert and Sarita Nash. We affirm.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

BACKGROUND

¶2 On February 22, 2015, Wilburn, then *pro se*, filed a small claims complaint against her ex-husband Robert Nash and his wife Sarita Nash (the Nashes). The complaint alleged “malicious prosecution, defamation of character slander/libel and abuse of process.” (Some capitalization omitted.) The complaint was based on Wilburn’s allegations that the Nashes filed three restraining orders against Wilburn “without probable cause,” “maliciously,” and based on “libel[ous] statements.” A small claims court commissioner found in favor of the Nashes.

¶3 Wilburn appealed the commissioner’s findings to the circuit court. The Nashes filed a motion for summary judgment arguing that there was an “absolute privilege” barring Wilburn’s defamation claims because any statements made by the Nashes were in relation to their restraining order hearings.

¶4 The circuit court granted summary judgment in favor of the Nashes finding that any statements made by the Nashes as they pertained to the injunction proceedings were protected by “absolute privilege.” Wilburn, through counsel, moved the circuit court for relief from the summary judgment.

¶5 At a hearing on the motion, the parties more extensively discussed the basis of Wilburn’s original complaint—namely, the abuse of process claim in which Wilburn implied that the Nashes filed restraining orders in order to maintain primary custody of the child Robert and Wilburn share, and malicious prosecution. The circuit court discussed the elements of both malicious prosecution and abuse of process. The court found that Wilburn did not plead the “special damages” required in a malicious prosecution claim, and that Wilburn’s complaint was “not sufficient” as to her abuse of process claim. This appeal follows.

DISCUSSION

¶6 On appeal, Wilburn argues that because the Nashes only moved for summary judgment on the defamation claim, the circuit court erroneously dismissed Wilburn’s abuse of process and malicious prosecution claims. Wilburn also argues that the court erroneously denied her motion for relief because the Nashes did not file an opposition motion and the court misinterpreted the law.

¶7 We review *de novo* the grant of summary judgment, employing the same methodology as the circuit court. See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Conversely, a circuit court’s order denying a motion for postjudgment relief is reviewed for an erroneous exercise of discretion. See *State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis. 2d 618, 629-30, 511 N.W.2d 868 (1994). “Discretionary acts are sustained if the [circuit] court ‘examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.’” *Richards v. Land Star Grp., Inc.*, 224 Wis. 2d 829, 848, 593 N.W.2d 103 (Ct. App. 1999) (citation omitted). “We will generally look for reasons to sustain a [circuit] court’s discretionary decision.” *Murray v. Murray*, 231 Wis. 2d 71, 78, 604 N.W.2d 912 (Ct. App. 1999). “Where the [circuit] court fails to adequately explain the reasons for its decision, we will independently review the record to determine whether it provides a reasonable basis for the [circuit] court’s discretionary ruling.” *State v. Clark*, 179 Wis. 2d 484, 490, 507 N.W.2d 172 (Ct. App. 1993).

¶8 As Wilburn notes, the circuit court only addressed the defamation claim at the initial summary judgment hearing; however, at a hearing on Wilburn’s motion for relief, the court thoroughly discussed the elements of abuse of process and malicious prosecution and found no basis for Wilburn’s claims. We agree.

¶9 A claim for abuse of process exists where “one ‘uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed.’” *Tower Special Facilities, Inc. v. Investment Club, Inc.*, 104 Wis. 2d 221, 229, 311 N.W.2d 225 (Ct. App. 1981) (citation omitted). Abuse of process has two elements: (1) “‘a wilful act in the use of process not proper in the regular conduct of the proceedings’” and (2) “‘an ulterior motive.’” *Brownsell v. Klawitter*, 102 Wis. 2d 108, 115, 306 N.W.2d 41 (1981) (citation omitted).

Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.

Thompson v. Beecham, 72 Wis. 2d 356, 362, 241 N.W.2d 163 (1976).

¶10 Wilburn’s complaint implied that the Nashes filed restraining orders against Wilburn for the purpose of interfering with legal proceedings concerning Robert and Wilburn’s child. The circuit court found that Wilburn did not provide proof of the abuse of process elements and expressed concern about the “potential chilling effect on those who need to file a restraining order.” The circuit court did not erroneously exercise its discretion.

¶11 The tort of malicious prosecution is traditionally not favored and “we have taken a restrictive position” on its application, requiring a plaintiff to

meet a “stringent burden.” *Krieg v. Dayton-Hudson Corp.*, 104 Wis. 2d 455, 460, 311 N.W.2d 641 (1981). Six elements are necessary for an action for malicious prosecution:

1. There must have been a prior institution or continuation of some regular judicial proceedings against the plaintiff in this action for malicious prosecution.
2. Such former proceedings must have been by, or at the instance of the defendant in this action for malicious prosecution.
3. The former proceedings must have terminated in favor of the defendant therein, the plaintiff in the action for malicious prosecution.
4. There must have been malice in instituting the former proceedings.
5. There must have been want of probable cause for the institution of the former proceedings.
6. There must have been injury or damage resulting to the plaintiff from the former proceedings.

Schier v. Denny, 9 Wis. 2d 340, 342, 101 N.W.2d 35 (1960) (citation and quotation marks omitted). “The burden of proof is upon the plaintiff to establish all six elements; and, if [he or she] fails with respect to any one of them, the defendant prevails.” *Tower Special Facilities, Inc.*, 104 Wis. 2d at 227 (citation omitted).

¶12 In order to recover for malicious prosecution, a plaintiff must prove “special damages.” *Johnson v. Calado*, 159 Wis. 2d 446, 460-61, 464 N.W.2d 647 (1991). “[A] cause of action for malicious prosecution is not stated by a complaint which ... alleg[es] that [the] plaintiff incurred expense in defending himself against the prosecution alleged to be malicious.” *Schier*, 9 Wis. 2d at 345; *see also Calado*, 159 Wis. 2d at 448-49. “Embarrassment, inconvenience, loss of

work and leisure time, stress, strain, and worry ... fail to qualify as substantial interference and do not constitute special damages” and “[w]hile counsel fees and costs may be an element of damages in a successful malicious prosecution action, they do not by themselves constitute the special grievance necessary to make out the cause of action.” 54 C.J.S. *Malicious Prosecution* § 8 (2007); *see also Schier*, 9 Wis. 2d at 341.

¶13 Wilburn did not plead anything that qualifies as “special damages.” Accordingly, she has failed to plead at least one element of malicious prosecution, there is no basis for her claim of relief, and the circuit court did not erroneously exercise its discretion in denying her motion.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

